

# Revising Wisconsin's Government Immunity Doctrine

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# REVISING WISCONSIN'S GOVERNMENT IMMUNITY DOCTRINE

## I. INTRODUCTION

In *Scott v. Savers Property & Casualty Insurance Co.*,<sup>1</sup> the Wisconsin Supreme Court held that government immunity<sup>2</sup> protected a Wisconsin school district from liability for the negligence of its guidance counselor who had provided a student with incorrect information regarding the eligibility requirements for a student-athlete scholarship.<sup>3</sup> The guidance counselor's negligence resulted in the student losing a hockey scholarship he had received from the University of Alaska.<sup>4</sup>

While the court held that government immunity protected the school district from liability, the court characterized the outcome of the case as "harsh" because of the clear negligence of the guidance counselor.<sup>5</sup> Moreover, the concurring and dissenting opinions revealed that a majority of the justices had reservations about Wisconsin's current government immunity doctrine.<sup>6</sup> In fact, Justice Bablitch, in a concurrence joined by Justice Crooks, showed more than mere reservations about the present state of government immunity in Wisconsin when he called the protection provided by such immunity "unjust" and predicted that "[a] doctrine of governmental immunity that has caused such injustice and inequity, in this case and others, cannot, and . . . will not, stand much longer."<sup>8</sup> Justice Prosser, in his dissenting opinion, also characterized Wisconsin's government immunity doctrine as "unjust" and declared the doctrine "contrary to

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1. 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715.

2. In Wisconsin, the concept of government immunity is "sometimes referred to as 'municipal' or 'governmental' immunity, or 'public officer' immunity, or even 'discretionary act' immunity." *Hoskins v. Dodge County*, 2002 WI App 40, ¶ 13, 251 Wis. 2d 276, 642 N.W.2d 213.

3. *Scott*, 2003 WI 60, ¶¶ 8–10.

4. *Id.* ¶¶ 8–10.

5. *Id.* ¶ 37.

6. *Id.* ¶¶ 58–59 (Abrahamson, C.J., concurring); *id.* ¶¶ 61–63 (Bablitch, J., concurring); *id.* ¶¶ 75–82 (Prosser, J., dissenting).

7. *Id.* ¶ 62 (Bablitch, J., concurring).

8. *Id.*

legislative intent.”<sup>9</sup> The majority opinion, however, recognized that government immunity “plays a significant role in our legal system” and was reluctant to remove the protection it provided.<sup>10</sup>

Government immunity does serve an important role in our legal system.<sup>11</sup> However, as evidenced by the unjust outcome of the *Scott* case, Wisconsin’s government immunity doctrine is in need of revision.<sup>12</sup> The analysis used in determining whether government immunity will shield negligent conduct from liability needs to be reexamined. First, the analysis needs to focus on the particular act at issue and not on the general duties of the public official.<sup>13</sup> Second, the analysis needs to ensure that government immunity protects government action only when it serves an important public policy and not merely because the act is discretionary, rather than ministerial, in nature.<sup>14</sup>

Part II of this Comment briefly defines government immunity, and Part III provides some historical background. Part IV discusses some of the policy objectives that have been cited in support of government immunity and some of the arguments for limiting the application of government immunity. The conclusion of Part IV is that the only policy objectives that adequately justify applying government immunity are those that concern the separation of powers. Part V discusses the discretionary/ministerial test that courts, including the Wisconsin courts, have used to determine whether government immunity will apply. Part V then suggests that to ensure that government immunity is only applied when public policy warrants shielding the government from liability, the courts should consider (1) whether the particular government act at issue is discretionary in nature, (2) whether the act involves a policy

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9. *Id.* ¶ 82 (Prosser, J., dissenting).

10. *Id.* ¶¶ 35–37.

11. *See infra* Part IV.

12. Some of the Wisconsin Supreme Court Justices seemed willing to revise the government immunity doctrine. *See Scott*, 2003 WI 60, ¶¶ 58–60 (Abrahamson, C.J., concurring); *id.* ¶¶ 61–64 (Bablitch, J., concurring); *id.* ¶¶ 75–82 (Prosser, J., dissenting). Chief Justice Abrahamson, in her concurrence joined by Justices Bablitch and Crooks, suggested that if the court was ready to revisit Wisconsin’s government immunity doctrine, the court “should set [the *Scott*] case for rebriefing and re-argument . . . and invite amicus curiae participation from affected actors.” *Id.* ¶¶ 58–59 (Abrahamson, C.J., concurring). The court later denied the motion for reconsideration of the *Scott* case. *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 140, 266 Wis. 2d 68, 671 N.W.2d 853.

13. *Rolland v. County of Milwaukee*, 2001 WI App 53, ¶ 8, 241 Wis. 2d 215, 625 N.W.2d 590 (“[I]t is the nature of the specific act upon which liability is based, as opposed to the categorization of the general duties of a public officer, which is determinative of whether an officer is immune from liability.” (internal citation omitted)).

14. *See infra* Parts IV–V.

decision, and (3) whether the court system provides an adequate framework for monitoring or disciplining the government action. Part VI discusses Wisconsin's government immunity doctrine, and Part VII explains why applying government immunity in the *Scott* case was problematic.

## II. GOVERNMENT IMMUNITY: A BRIEF DEFINITION

"An immunity is a freedom from suit or liability"<sup>15</sup> and is based on the idea that even "though the defendant might be a wrongdoer, social values of great importance require[] that the defendant escape liability."<sup>16</sup> Thus, government immunity permits government entities and public officials to avoid suits or liability<sup>17</sup> when it is adequately justified by public policy.<sup>18</sup> Traditional government immunity refers to immunity attaching to all levels of government.<sup>19</sup> However, in some jurisdictions, government immunity refers to the immunity of the state's political subdivisions and sovereign immunity refers to the immunity of the state.<sup>20</sup>

## III. GOVERNMENT IMMUNITY: A BRIEF HISTORY

The American concept of government immunity is said to have derived from the English common law notion that the king could do no

15. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1032 (5th ed. 1984).

16. *Id.*

17. *Scott*, 2003 WI 60, ¶¶ 14–16; KEETON ET AL., *supra* note 15, at § 131, at 1032–33; 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* §§ 1, 10, at 40–41, 51 (2001).

18. KEETON ET AL., *supra* note 15, § 131, at 1032 (stating that "social values of great importance" may permit a defendant to avoid liability and noting that these social values are "apt to be grounded in values and perceptions of the times"); *see also* Hillerby v. Town of Colchester, 706 A.2d 446, 449 (Vt. 1997) (Dooley, J., dissenting) ("Our task should be to tailor our law on municipal immunity to the modern policy reasons for recognizing such immunity."); *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 89–90, 596 N.W.2d 417, 421–22 (1999) (noting that "governmental immunity is founded upon policy considerations"). For some of the policy considerations cited in support of government immunity, *see infra* Part IV.

19. KEETON ET AL., *supra* note 15, § 131, at 1033 ("The traditional governmental immunity protects governments at all levels from legal actions."); Jamie McAlister, *The New Mexico Tort Claims Act: The King Can Do "Little" Wrong*, 21 N.M. L. REV. 441, 441 (1991) ("Traditional governmental immunity exempts all levels of government from legal suits against the government and its entities.").

20. 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 10, at 51 (2001). In Wisconsin, the concept of government immunity is distinct from the concept of sovereign immunity. *Kierstyn*, 228 Wis. 2d at 89–90, 596 N.W.2d at 421–22; *see also infra* Part VI and note 99.

wrong.<sup>21</sup> This notion that the king could do no wrong was articulated in *Blackstone's Commentaries on the Laws of England*, which stated that "[t]he king . . . is not only incapable of *doing* wrong, but even of *thinking* wrong."<sup>22</sup> Eventually, because most states adopted the English common law,<sup>23</sup> the concept of government immunity found a place in American law as well.<sup>24</sup>

While America's adoption of the English common law was not unusual,<sup>25</sup> America's acceptance of the doctrine of government immunity is surprising.<sup>26</sup> It seems odd that this nation would accept a doctrine based on the notion that the king could do no wrong when the founders of this nation clearly felt that the king indeed could do wrong.<sup>27</sup>

21. *Britten v. City of Eau Claire*, 260 Wis. 382, 386, 51 N.W.2d 30, 32 (1952); Gerald P. Krause, Comment, *Municipal Liability: The Failure to Provide Adequate Police Protection – The Special Duty Doctrine Should be Discarded*, 1984 WIS. L. REV. 499, 500 (1984); KEETON ET AL., *supra* note 15, § 131, at 1033; *but see* 1 J. D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY & LITIGATION § 16.01, at 554 (rev. ed. 1994) (noting that Bracton's writings regarding "the supremacy of the law over kings," which became "established English doctrine," meant that "the king *was not permitted by law* to do wrong. It did not mean that the king could do no wrong if left to his own devices"); 2 STUART M. SPEISER, CHARLES F. KRAUSE, & ALFRED W. GANS, THE AMERICAN LAW OF TORTS 8, n.5 (2003) (discussing three theories regarding the origin of government immunity as applied to municipalities and other local units of government).

22. 1 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 187 (Wayne Morrison ed., Cavendish Publishing Limited 2001); LEE & LINDAHL, *supra* note 21, § 16.01, at 553.

23. LEE & LINDAHL, *supra* note 21, § 16.01, at 553 ("Most of the American states adopted English common law as it existed up to the date of the Declaration of Independence."); 15A AM. JUR. 2D *Common Law* § 10, at 574 (2001) (noting that the "English common law has been adopted as the basis of jurisprudence in all the states . . . with the exception of Louisiana, where the civil law prevails in civil matters").

24. KEETON ET AL., *supra* note 15, § 131, at 1033; LEE & LINDAHL, *supra* note 21, §§ 16.01, 16.09, at 553–55, 573–74; Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 TUL. L. REV. 149, 149 (2001); McAlister, *supra* note 19 at 442 and nn.13–14; Krause, *supra* note 21, at 500–02.

25. *See supra* note 23.

26. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 30–31, 115 N.W.2d 618, 620 (1962) ("It would seem somewhat anomalous that American courts should have adopted the sovereign immunity theory in the first place since it was based upon the divine right of kings."), *superseded by statute as stated in* *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 34, 262 Wis. 2d 127, 663 N.W.2d 715; LEE & LINDAHL, *supra* note 21, § 16.01, at 553–55; Brown, *supra* note 24, at 149–50; *see also* KEETON ET AL., *supra* note 15, § 131, at 1033; McAlister, *supra* note 19, at n.13.

27. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *Graysneck v. Heard*, 220 A.2d 893, 895 (Pa. 1966) (Musmanno, J., dissenting) ("Our very nation is founded on the proposition that a king can be wrong, very wrong. Thomas Jefferson wrote a strong indictment against King George III, it will be recalled."); LEE & LINDAHL, *supra* note 21, § 16.01, at 554.

After all, the Declaration of Independence listed "a long train of abuses and usurpations" by the king.<sup>28</sup> Moreover, as evidenced by the constitutional provision for impeachment, the founders acknowledged that the president, vice president, and civil officers of their new government were capable of wrongdoing.<sup>29</sup> Thus, although the doctrine of government immunity was present in early American cases,<sup>30</sup> the acceptance of the doctrine into American law is surprising when one understands the doctrine's history.

#### IV. POLICY CONSIDERATIONS: GOVERNMENT IMMUNITY'S PLACE IN AMERICAN LAW

Regardless of how or why, the doctrine of government immunity became embedded in American law. The question is whether government immunity should still have a place in American law. After all, such immunity exempts government from liability for its tortious conduct<sup>31</sup> and contradicts the basic tort principle that liability should follow negligence.<sup>32</sup> Moreover, exempting a wrongdoer from liability solely because the wrongdoer is a government entity or a public official seems counterintuitive to one's basic sense of justice.<sup>33</sup> Thus, as a general rule, government should be subject to the same rules as private parties for tortious conduct<sup>34</sup> and should be exempt from liability for

28. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* LEE & LINDAHL, *supra* note 21, § 16.01, at 554.

29. *See* U.S. CONST. art. II, § 4; *see also* LEE & LINDAHL, *supra* note 21, § 16.01, at 554.

30. KEETON ET AL., *supra* note 15, § 131, at 1033 and n.8; McAlister, *supra* note 19 at 442 and nn.13–14; Krause, *supra* note 21, at 500–02.

31. KEETON ET AL., *supra* note 15, § 131, at 1032–33; Krause, *supra* note 21, at 500; 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* §§ 1, 3, at 40–42, (2001); *see, e.g.,* Scott v. Savers Prop. & Cas. Ins. Co., 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715.

32. Merrill v. City of Manchester, 332 A.2d 378, 383 (N.H. 1974); Hillerby v. Town of Colchester, 706 A.2d 446, 453 (Vt. 1997) (Johnson, J., dissenting); Krause, *supra* note 21, at 503; *see also* Battalla v. New York, 176 N.E.2d 729, 730 (N.Y. 1961) ("[A] wrong-doer is responsible for the natural and proximate consequences of his misconduct . . .") (internal citations omitted); KEETON ET AL., *supra* note 15, § 30, at 164–65 (noting that liability will follow negligence if the elements of duty, breach, cause, and harm are established).

33. *See* Feingold v. Southeastern Pa. Transp. Auth., 517 A.2d 1270, 1279 (Pa. 1986) (Larsen, J., dissenting); J. Michael Riley, *Discretionary Immunity: The Exception That Swallowed the Rule*, 19 THE VERDICT, Summer 1996, at 10, 15.

34. City of Louisville v. Chapman, 413 S.W.2d 74, 77 (Ky. Ct. App. 1967) (stating that government officials should be "held to the same safety standards as other citizens"); Merrill, 332 A.2d at 383 (stating that "removal of immunity does not impose absolute or strict liability on cities and towns but merely places them subject to the same rules as private corporations if a duty has been violated and a tort committed"); Hillerby, 706 A.2d at 458 (Johnson, J., dissenting) (noting that government should be placed "on an equal footing with private

tortious conduct only when “social values of great importance” adequately justify applying government immunity.<sup>35</sup>

### A. Maintaining the Separation of Powers

One justification for government immunity is that the doctrine helps to maintain the separation of powers, an important feature of our governmental system.<sup>36</sup> The argument is that to have separate and co-equal branches of government, public officials must be able to use “free and independent judgment” when making policy decisions<sup>37</sup>—those decisions that require the “weighing of competing social, economic, and political policy considerations.”<sup>38</sup> Government immunity is necessary

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corporate entities” for tortious conduct unless the government action is “policy-based or . . . adjudicative, legislative, or regulatory in nature”). Congress, in enacting the Federal Tort Claims Act, provided that the national government would be liable with regard to tort claims “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674 (2004).

35. KEETON ET AL., *supra* note 15, § 131, at 1032.

36. *Indus. Indem. Co. v. Alaska*, 669 P.2d 561, 563 (Alaska 1983) (“The principal policy underlying the tort immunity is to limit judicial reexamination of decisions properly entrusted to other branches of government.”); *Peavler v. Bd. of Comm’rs of Monroe County*, 528 N.E.2d 40, 44 (Ind. 1988) (“The policy underlying governmental immunity is the fundamental idea that certain kinds of executive branch decisions should not be subject to judicial review. The separation of powers doctrine forecloses the courts from reviewing political, social and economic actions within the province of coordinate branches of government.”); *Hillerby*, 706 A.2d at 457 (Johnson, J. dissenting) (“To preserve separate and coequal branches of government that best serve the public’s interests, government officials must feel that they can use free and independent judgment, without the threat of liability hanging over them, regarding decisions involving the balancing of priorities or the allocation of resources.”); KEETON ET AL., *supra* note 15, § 131, at 1033 (noting that “judicial review of executive action in tort suits or otherwise presents some degree of threat to the independence of the executive and the separation of powers”); *Krause*, *supra* note 21, at 502 (noting that one policy rationale for government immunity is that government immunity ensures that the judiciary does not “indiscriminately impose its authority on other branches of government”); *see also* *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶¶ 35–36 & n.26, 262 Wis. 2d 127, 663 N.W.2d 715 (noting that government immunity enables public officials to perform their duties without being influenced by the threat of a lawsuit and that the misconduct of public officials should be addressed through the political, rather than judicial, process).

37. *Hillerby*, 706 A.2d at 457 (Johnson, J., dissenting) (“To preserve separate and coequal branches of government that best serve the public’s interests, government officials must feel that they can use free and independent judgment, without the threat of liability hanging over them, regarding decisions involving the balancing of priorities or the allocation of resources.”); *see also* *Haddock v. City of New York*, 553 N.E.2d 987, 991 (N.Y. 1990); *Scott*, 2003 WI 60, ¶ 36.

38. *Indus. Risk Insurers v. New Orleans Pub. Serv., Inc.*, 735 F. Supp. 200, 204 (E.D. La. 1990); *see also* *Kautzman v. McDonald*, 621 N.W.2d 871, 879–80 (N.D. 2001) (noting that “public policy considerations, social, economic, or political, must be distinguished from more objective standards based on, for example, scientific, engineering, or technical considerations” (internal citations omitted)); John W. Bagby & Gary L. Gittings, *The Elusive*

then because the threat of liability for policy decisions might interfere with the free and independent judgment of public officials,<sup>39</sup> and public officials should be protected from undue judicial influence.<sup>40</sup>

In addition to ensuring the free and independent judgment of public officials, another justification for applying government immunity to policy decisions of public officials is that a court may not be the appropriate forum for monitoring policy decisions where the real issues are not due care or reasonableness, but "social wisdom," "political practicability," and "economic expediency."<sup>41</sup> Unless objective professional standards could be applied to the challenged act and tort liability could offer a reliable method of assessment,<sup>42</sup> the political process may be the more appropriate method for monitoring or disciplining policy decisions.<sup>43</sup>

### B. Protecting the Public Purse

Another policy cited in support of government immunity is that the doctrine protects the public purse.<sup>44</sup> The argument is that public funds

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*Discretionary Function Exception From Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L. J. 223, 253 (1992) ("Policy decisions are grounded in social, economic, and political considerations involving issues of social wisdom, political practicability, and economic expediency." (internal citations omitted)).

39. *Peavler*, 528 N.E.2d at 44; *Haddock*, 553 N.E.2d at 991; *Hillerby*, 706 A.2d at 457 (Johnson, J., dissenting); *Scott*, 2003 WI 60, ¶ 36; KEETON ET AL., *supra* note 15, § 131, at 1033; Bagby & Gittings, *supra* note 38, at 247; Krause, *supra* note 21, at 502.

40. *Peavler*, 528 N.E.2d at 44; KEETON ET AL., *supra* note 15, § 131, at 1033; Bagby & Gittings, *supra* note 38, at 247; Krause, *supra* note 21, at 502.

41. *Blessing v. United States*, 447 F. Supp. 1160, 1170 (E.D. Pa 1978); *see also Indus. Indem. Co. v. Alaska*, 669 P.2d 561, 563 (Alaska 1983) ("The judicial branch lacks the fact-finding ability of the legislature, and the special expertise of the executive departments. . . . [T]he courts . . . should not attempt to balance the detailed and competing elements of legislative or executive decisions."); *Peavler*, 528 N.E.2d at 44-45; *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 431 (Tenn. 1992); Bagby & Gittings, *supra* note 38, at 247.

42. *Peavler*, 528 N.E.2d at 47 (noting that if a decision is not a policy decision but is instead based on professional judgment, then "traditional tort standards for professional negligence afford a basis for evaluation"); Bagby & Gittings, *supra* note 38, at 257-58 (noting that under the Federal Tort Claims Act, where "the standards to be applied involve objective and known criteria or require only the exercise of scientific or professional judgments that are reviewable under tort law, the government is not shielded from liability").

43. *See Scott*, 2003 WI 60, ¶ 35 & n.26 (noting that one policy rationale underlying the doctrine of government immunity is that the misconduct of political officials should be addressed through the political, rather than judicial, process); *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 23, 253 Wis. 2d 323, 646 N.W.2d 314 (noting that government immunity is based in part on a "preference for political rather than judicial redress for the actions of public officers").

44. *See, e.g., Vargas v. Glades Gen. Hosp.*, 566 So. 2d 282, 284 (Fla. Dist. Ct. App. 1990); *Scott*, 2003 WI 60, ¶ 35; *Lodl*, 2002 WI 71, ¶ 23; *see also Sams v. City of Brookfield*, 97 Wis.



should be used for public purposes rather than for satisfying liability judgments<sup>45</sup> and that individual plaintiffs should not be “compensated at the expense of the general public.”<sup>46</sup> However, if the public does not bear the cost, the victim of the government’s tortious conduct is left with “no avenue for redress”<sup>47</sup> and is forced to “bear the burden of loss alone without recompense from the wrongdoer.”<sup>48</sup> Such a result neither complies with the modern tort principle that liability follows negligence<sup>49</sup> nor with the idea that the victim of tortious conduct is entitled to a remedy.<sup>50</sup> Thus, when a government entity or a public official is negligent, the government should be liable, even if that means that the general public must bear the cost.<sup>51</sup> The liability should be regarded as “a cost of the administration of government.”<sup>52</sup> After all, such liability or cost would not have arisen if the public official had not acted in a

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2d 356, 372, 293 N.W.2d 504, 512 (1980); Brown, *supra* note 24 at 152; McAlister, *supra* note 19, at 442; Krause, *supra* note 21, at 502–03.

45. *Merrill v. City of Manchester*, 332 A.2d 378, 380 (N.H. 1974) (noting that one of the reasons for government immunity that evolved was that “cities and towns could not carry on their functions if moneys raised by taxation for public use were diverted to making good for torts of employees”); McAlister, *supra* note 19, at 442 (noting that New Mexico’s judicial acceptance of government immunity was, in large part, based on a reluctance to use public funds “for the satisfaction of liability judgments instead of for the public purpose for which they were appropriated”) (internal citations omitted); Krause, *supra* note 21, at 502 (noting that one policy rationale cited in support of government immunity is that without such immunity governments would have to “use funds allocated to other essential functions” to satisfy adverse judgments).

46. Krause, *supra* note 21, at 502.

47. *Scott*, 2003 WI 60, ¶ 37.

48. McAlister, *supra* note 19, at 442; *see also Merrill*, 332 A.2d at 380 (“That an individual injured by the negligence of the employees of a municipal corporation should bear his loss himself . . . instead of having it borne by the public treasury to which he and all other citizens contribute, offends the basic principles of equality of burdens and of elementary justice.”); *Roman Catholic Diocese of Vt., Inc. v. City of Winooski Hous. Auth.*, 408 A.2d 649, 650 (Vt. 1979) (noting that the effect of government immunity is to “sacrifice the injured citizen to the benefit of the public treasury”).

49. *Merrill*, 332 A.2d at 380–81, 383; *Hillerby v. Town of Colchester*, 706 A.2d 446, 453 (Vt. 1997) (Johnson, J., dissenting); Krause, *supra* note 21, at 503; *see also supra* note 32.

50. Tort law is “directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests.” KEETON ET AL., *supra* note 15, § 1, at 5–6.

51. *Hillerby*, 706 A.2d at 454 (Johnson, J., dissenting) (noting that “most jurisdictions abrogated general municipal immunity between the late 1950s and the early 1980s, recognizing that the community at large rather than the individual should bear the risk of injury resulting from the negligent conduct of government employees”); RESTATEMENT (SECOND) OF TORTS § 895C cmt. d (2003); Krause, *supra* note 21, at 503.

52. RESTATEMENT (SECOND) OF TORTS § 895C cmt. d (2003); Krause, *supra* note 21, at 503; *see also Feingold v. Southeastern Pa. Transp. Auth.*, 517 A.2d 1270, 1278 (Pa. 1986) (Larsen, J., dissenting).

tortious manner in the performance of his or her duties. Moreover, any increased costs will be “overcome by the added societal benefits of more effective and efficient government”<sup>53</sup> because compensating the victim of tortious conduct not only provides that victim with a remedy but also deters future government wrongdoing.<sup>54</sup> Furthermore, the government can prepare for the cost of liability judgments by obtaining liability insurance.<sup>55</sup>

### C. Ensuring the Orderly Administration of Government

Proponents of government immunity have also argued that the doctrine helps to ensure the “orderly administration of government.”<sup>56</sup> Subjecting the government to liability does have the potential to create an administrative burden because government action can affect large

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53. Bagby & Gittings, *supra* note 38, at 261.

54. *Merrill*, 332 A.2d at 383; *Feingold*, 517 A.2d at 1278 (Larsen, J., dissenting); Bagby & Gittings, *supra* note 38, at 261–62.

[C]ritics might note that governments and their employees seldom bear directly the negative wealth effects of their negligence. Instead, the public bears these losses through higher taxes, diminished government services, and other reductions in social welfare. However, the public is growing less tolerant of these outcomes. As voters gain a heightened awareness of the governmental budgeting process, and exert greater populist pressure to justify government programs, governmental budget balancing will be required because voters are resisting tax hikes. In this environment, the political process pressures government officials to . . . better monitor their subordinates' activities. . . . While government employees seldom suffer personal financial loss for the effect of their decisions, . . . a similar level of ambiguity and insulation is experienced by employees in large private businesses. Therefore, the expansion of government liability to activities for which the private sector is traditionally responsible actually brings the incentives of both government and private activity closer together, arguably improving government's responsibility.

Bagby & Gittings, *supra* note 38, at 262. However, some proponents of government immunity argue that exposure to tort liability may not encourage government officials to use due care in the performance of their duties, but rather cause government officials “to forego their public duties . . . to minimize government's exposure to damages.” Brown, *supra* note 24, at 153.

55. *City of Louisville v. Chapman*, 413 S.W.2d 74, 77 (Ky. Ct. App. 1967) (“Private citizens voluntarily and for good economic reasons insure themselves against tort liability. Why shouldn't a collection of citizens classified as a municipality do likewise?”); *Merrill*, 332 A.2d at 383 (“Liability insurance which protects other corporations, be they private business or charitable institutions, can provide the same safeguards for municipal corporations.”); see also *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1238 (Miss. 1999); *Morway v. Trombly*, 789 A.2d 965, 969 (Vt. 2001).

56. *G.M. McCrossin, Inc. v. W. Va. Bd. of Regents*, 355 S.E.2d 32, 34 (W. Va. 1987); see also *Vargas v. Glades Gen. Hosp.*, 566 So. 2d 283, 284 (Fla. Dist. Ct. App. 1990).

numbers of people in a variety of ways.<sup>57</sup> However, there is little support for the contention that, without the doctrine of government immunity, the courts would be inundated with litigation or that there would be a significant impact on the administration of government.<sup>58</sup> Moreover, although "permitting actions against public entities entails some imposition of their time,"<sup>59</sup> the basic tort principle that liability should follow negligence still applies.<sup>60</sup> Thus, any increased administrative burden is a cost that must be endured to ensure that victims of government's tortious conduct are compensated.<sup>61</sup> The government can reduce the administrative burden by using due care in the performance of its duties and by reducing the amount of tortious conduct, which serves as the basis for such lawsuits. Expecting public officials to use care in the performance of their duties is not too much to ask in that it puts government on the same footing as private parties.<sup>62</sup>

#### *D. Preventing Individuals from Being Discouraged to Enter Public Service*

Another argument cited in support of government immunity is that without it, individuals may be discouraged from entering into public service because they would face the threat of liability for performing their duties.<sup>63</sup> However, because removing government immunity simply

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57. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 372, 293 N.W.2d 504, 514 (1980) ("Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a large number of people."); 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 2, at 41-42 (2001).

58. See *Bd. of Comm'rs of the Port of New Orleans*, 273 So. 2d at 25 ("It is clear that fears of those who believed the doctrine [of government immunity] necessary to existence of government were unfounded. No agency that we know of has been bankrupted by the torts of its employees nor submerged in litigation."); *Merrill*, 332 A.2d at 383 (citing *Ayala v. Phila. Bd. of Pub. Educ.*, 305 A.2d 877, 882 (Pa. 1973)) ("[T]he empirical data does not support the fear that governmental functions would be curtailed as a result of liability for tortious conduct."); *Riley*, *supra* note 33, at 14 (noting that "permitting actions against public entities entails some imposition on their time" but also noting that "[t]here has . . . been no showing this would involve a significant burden or would disrupt government operation in any meaningful way").

59. *Riley*, *supra* note 33, at 14.

60. *Merrill*, 332 A.2d at 380-81, 383; *Hillerby v. Town of Colchester*, 706 A.2d 446, 453 (Vt. 1997) (Johnson, J., dissenting); *Krause*, *supra* note 21, at 503; see also *supra* note 32.

61. *Merrill*, 332 A.2d at 380; *Roman Catholic Diocese of Vt., Inc. v. City of Winooski Hous. Auth.*, 408 A.2d 649, 650 (Vt. 1979); see *supra* note 50.

62. *City of Louisville v. Chapman*, 413 S.W.2d 74, 77 (Ky. Ct. App. 1967); *Merrill*, 332 A.2d at 383; *Hillerby*, 706 A.2d at 458 (Johnson, J., dissenting); see *supra* note 34.

63. *Stephenson v. State Dep't of Transp.*, 619 P.2d 247, 250 (Or. 1980) (noting that one rationale for immunity is that "without immunity, highly skilled employees would not accept

puts public officials on equal footing with private parties,<sup>64</sup> the threat of liability for tortious conduct should not discourage individuals from entering public service any more than the threat of liability for tortious conduct would discourage individuals from taking a position with a private entity.

In conclusion, while many arguments are offered in support of government immunity, the only policy that adequately justifies leaving an injured victim without redress for the government's tortious conduct is the doctrine of separation of powers.<sup>65</sup> Because government immunity serves a valuable role in maintaining the separation of powers, public policy justifies applying immunity where the challenged government action is of a policymaking character—involving social, economic, or political judgments—and where the government action is best monitored through the political process rather than through tort actions.<sup>66</sup> Although government immunity does have a place in American law, it is important to be mindful of the consequences of applying government immunity in a given case. Unfortunately, where government immunity is applied, the injured victim will be left without a remedy.<sup>67</sup> Thus, the application of government immunity must be limited to only those circumstances where tort liability would implicate separation of powers concerns.<sup>68</sup> A blanket rule of government immunity is not necessary; rather, the government should be placed on equal footing with private parties when the government action is not of a policymaking character<sup>69</sup> and when the government action can be

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public positions because the potential liability was not commensurate with the relatively low compensation that public bodies pay"); *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, n.26, 262 Wis. 2d 127, 663 N.W.2d 715 (stating that one policy consideration supporting government immunity is that, without government immunity, "the threat of personal liability" might deter people from "entering public service"); *but see Riley*, *supra* note 33, at 14 ("Government entities almost uniformly carry insurance, and public employees are generally entitled to indemnification as a matter of law. Given these realities, it is difficult to credit anyone will be deterred from public service or unfairly subjected to personal liability for the acts taken in their official capacities.").

64. *Merrill*, 332 A.2d at 383 (stating that "removal of immunity does not impose absolute or strict liability on cities and towns but merely places them subject to the same rules as private corporations if a duty has been violated and a tort committed").

65. *See supra* Part IV.A. and notes 36–43.

66. *See supra* Part IV.A. and notes 36–43.

67. *Roman Catholic Diocese of Vt., Inc. v. City of Winooski Hous. Auth.*, 408 A.2d 649, 650 (Vt. 1979) (noting that the effect of government immunity is to "sacrifice the injured citizen"); *see, e.g., Scott*, 2003 WI 60, ¶ 37 (stating that the plaintiff "has suffered greatly" and has "no avenue for redress").

68. *See Peavler v. Bd. of Comm'rs of Monroe County*, 528 N.E.2d 40, 46 (Ind. 1988).

69. *See id.* at 46 (noting that the "governmental entity seeking to establish immunity

adequately assessed through a tort action.<sup>70</sup>

## V. DETERMINING THE APPLICABILITY OF GOVERNMENT IMMUNITY

Various tests have been developed to limit the application of the doctrine of government immunity.<sup>71</sup> One such test is the discretionary/ministerial test, which typically shields government from liability in tort for discretionary acts while permitting liability for ministerial acts.<sup>72</sup> As a general rule, an act is deemed to be discretionary when the act involves "judgment and choice"<sup>73</sup> and can "typically produce different acceptable results."<sup>74</sup> Ministerial acts, on the other hand, have been defined as acts that leave no room for judgment<sup>75</sup> and stem from a duty that is "absolute, certain and imperative."<sup>76</sup> Thus, where a rule exists regarding how the public official should act, the act is generally ministerial and not discretionary.<sup>77</sup>

Policy decisions are typically discretionary in nature because policy decisions involve the "weighing of competing social, economic, and

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bears the burden of proving that the challenged act or omission was a policy decision made by consciously balancing risks and benefits"); *Hacking v. Town of Belmont*, 736 A.2d 1229, 1232-34 (N.H. 1999) (stating that an exception to the general rule of liability is immunity for executive or planning functions involving policy decisions); *Hillerby v. Town of Colchester*, 706 A.2d 446, 458 (Vt. 1997) (Johnson, J., dissenting) (noting that government should be placed "on an equal footing with private corporate entities" for tortious conduct unless the government action is "policy-based or . . . adjudicative, legislative, or regulatory in nature"); see also Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1532 (1992) (discussing the federal doctrine of sovereign immunity and noting that "the less that a particular action jeopardizes purposeful policy, the less the concern from the separation-of-powers vantage point").

70. See *Peavler*, 528 N.E.2d at 44-47.

71. For example, one test courts have used to limit the application of government immunity is the discretionary/ministerial test. This test typically provides immunity for discretionary functions and exposes government to liability for ministerial functions. See, e.g., *Scott*, 2003 WI 60. Another test courts have used distinguishes between governmental functions and proprietary functions; the government is protected from liability when the government is acting in a governmental capacity or acting in the interest of the public, and the government is exposed to liability when it acts in a corporate or proprietary capacity. See, e.g., *Hillerby*, 706 A.2d 447. For further discussion regarding tests courts have used in determining the applicability of government immunity, see LEE & LINDAHL, *supra* note 21, § 16.09, at 574-79.

72. LEE & LINDAHL, *supra* note 21, § 16.09, at 575; see, e.g., *Scott*, 2003 WI 60.

73. *Peavler*, 528 N.E.2d at 43.

74. *Haddock v. City of New York*, 553 N.E.2d 987, 991 (N.Y. 1990).

75. *Peavler*, 528 N.E.2d at 43; *Scott*, 2003 WI 60, ¶ 27.

76. *Scott*, 2003 WI 60, ¶ 27.

77. See *Peavler*, 528 N.E.2d at 43.

political policy considerations”<sup>78</sup> and the public official is not directed to act in a specific way but must use his or her judgment.<sup>79</sup> Because policymaking decisions are discretionary in nature, courts have attempted to maintain the separation of powers and protect policymaking decisions by applying government immunity to discretionary acts.<sup>80</sup> The problem with applying immunity to all of government’s discretionary acts, however, is that almost all government action is then protected, not just acts that truly involve policymaking.<sup>81</sup> This is because almost every decision involves some amount of discretion.<sup>82</sup> In fact, “it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.”<sup>83</sup>

Recognizing that immunity should not be applied to all government action but rather limited to only those acts necessary to maintain the separation of powers,<sup>84</sup> some jurisdictions require that to be deemed discretionary, the government act must involve more than just judgment—the act must also involve policymaking.<sup>85</sup> For example, the decisions of referees and coaches are decisions that do not involve policymaking, and, therefore, even though those decisions may involve some discretion and judgment, they would not be characterized as discretionary decisions entitled to be protected by government immunity.<sup>86</sup> Essentially, while the discretionary nature of the act at issue can be a useful starting point in determining whether government immunity should apply,<sup>87</sup> the inquiry cannot end there because nearly all

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78. *Indus. Risk Insurers v. New Orleans Pub. Serv., Inc.*, 735 F. Supp. 200, 204 (E.D. La. 1990).

79. *Peavler*, 528 N.E.2d at 43.

80. *Japan Air Lines Co. v. State*, 628 P.2d 934, 936 (Alaska 1981); *Peavler*, 528 N.E.2d at 44; *LEE & LINDAHL*, *supra* note 21, § 16.09, at 575; *Krause*, *supra* note 21, at 506–07.

81. See *Indus. Risk Insurers*, 735 F. Supp. at 202–03; *Peavler*, 528 N.E.2d at 43; *Hacking v. Town of Belmont*, 736 A.2d 1229, 1232–34 (N.H. 1999); *Trujillo v. Utah Dep’t of Transp.*, 986 P.2d 752, 758–59 (Utah Ct. App. 1999); *Bagby & Gittings*, *supra* note 38 at 228.

82. *Indus. Risk Insurers*, 735 F. Supp. at 203; *Ham v. Los Angeles County*, 189 P. 462, 468 (Cal. Dist. Ct. App. 1920); *Peavler*, 528 N.E.2d at 43; *Hacking*, 736 A.2d at 1234; *Trujillo*, 986 P.2d at 758 (Utah Ct. App. 1999); *Bagby & Gittings*, *supra* note 38 at 228.

83. *Ham*, 189 P. at 468.

84. *Peavler*, 528 N.E.2d at 43–46; *Trujillo*, 986 P.2d at 758–59.

85. See, e.g., *Indus. Risk Insurers*, 735 F. Supp. at 202–03; *Peavler*, 528 N.E.2d at 46; *Hacking*, 736 A.2d at 1234; *Haddock v. City of New York*, 553 N.E.2d 987, 991 (N.Y. 1990); *Trujillo*, 986 P.2d at 758–59.

86. *Hacking*, 736 A.2d at 1234.

87. See, e.g., *Kautzman v. McDonald*, 621 N.W.2d 871, 879–80 (N.D. 2001) (stating that

decisions involve at least some small amount of discretion<sup>88</sup> and immunity should not be used to protect all government decisions, but rather only those that involve policy decisions.<sup>89</sup>

Thus, in addition to considering whether the government act involves a policy decision, courts need to consider whether the act involves a policy decision that needs to be protected from judicial review to maintain separate and co-equal branches of government.<sup>90</sup> In other words, the courts need to consider whether the decisionmaker's actions should be assessed through the tort system. After all, policy decisions involving social, political, and economic judgments<sup>91</sup> are best made by the public officials faced with the decision and, as a general rule, should not be second-guessed by courts.<sup>92</sup> However, if objective professional standards could be applied to the challenged act, tort liability may be appropriate because it would offer a reliable way to monitor the government action<sup>93</sup> and would provide a remedy to the

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whether a political subdivision is exempt from liability begins by determining whether the act at issue is discretionary).

88. *Indus. Risk Insurers*, 735 F. Supp. at 203; *Ham*, 189 P. at 468; *Peavler*, 528 N.E.2d at 43; *Hacking*, 736 A.2d at 1234; *Trujillo*, 986 P.2d at 758; Bagby & Gittings, *supra* note 38 at 228.

89. *Peavler*, 528 N.E.2d at 45-47; *Hacking*, 736 A.2d at 1232-35; *Hillerby v. Town of Colchester*, 706 A.2d 446, 458 (Vt. 1997) (Johnson, J., dissenting); *Trujillo*, 986 P.2d at 758-59.

90. *Peavler*, 528 N.E.2d at 44-45 ("The separation of powers doctrine forecloses the courts from reviewing political, social, and economic actions within the province of coordinate branches of government."); *Hillerby*, 706 A.2d at 457 (Johnson, J. dissenting) ("To preserve separate and coequal branches of government that best serve the public's interests, government officials must feel that they can use free and independent judgment, without the threat of liability hanging over them, regarding decisions involving the balancing of priorities or the allocation of resources."); *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 36, 262 Wis. 2d 127, 663 N.W.2d 715 ("Governmental immunity was developed 'to protect public officers from being unduly hampered or intimidated in the discretion of their functions by threat of lawsuit or personal liability.'") (quoting *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 682, 292 N.W.2d 816, 825 (1980)); *KEETON ET AL.*, *supra* note 15, § 131, at 1033 ("[J]udicial review of executive action in tort suits or otherwise presents some degree of threat to the independence of the executive and the separation of powers.").

91. *Indus. Risk Insurers v. New Orleans Pub. Serv., Inc.*, 735 F. Supp. 200, 204 (E.D. La. 1990); *Kautzman*, 621 N.W.2d at 879 (noting that "public policy considerations, social, economic, or political, must be distinguished from more objective standards based on, for example, scientific, engineering, or technical considerations").

92. *Peavler*, 528 N.E.2d at 44.

93. *Peavler*, 528 N.E.2d at 47 (noting that if a decision is not a policy decision but is instead based on professional judgment, then "traditional tort standards for professional negligence afford a basis for evaluation"); *see also* Bagby & Gittings, *supra* note 38, at 257-58 (noting that under the Federal Tort Claims Act, where "the standards to be applied involve objective and known criteria or require only the exercise of scientific or professional judgments that are reviewable under tort law, the government is not shielded from liability").

victim of the tortious conduct.<sup>94</sup>

Because government immunity is an exception to the basic tort principle that liability should follow negligence,<sup>95</sup> the doctrine should be narrowly construed;<sup>96</sup> immunity should only protect discretionary government acts that truly involve policymaking and that are best monitored through the political process. To determine whether government immunity is appropriate in a given case, courts should consider each of the following: (1) whether the particular act at issue is discretionary in nature, (2) whether the act involves policy decisions, and (3) whether the court system can provide an adequate framework for monitoring or disciplining the act. Considering each of these three factors will limit the application of government immunity to situations where it is justified by public policy. As a result, it is more likely that those who are injured by the tortious conduct of public officials will be compensated.<sup>97</sup> At the same time, public officials will be held accountable for their tortious conduct, which will help to deter future government wrongdoing.<sup>98</sup>

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94. See *supra* note 50.

95. *Merrill v. Manchester*, 332 A.2d 378, 380–81, 382–83 (N.H. 1974); *Hillerby v. Town of Colchester*, 706 A.2d 446, 453 (Vt. 1997) (Johnson, J., dissenting); Krause, *supra* note 21, at 503; see also *supra* note 32.

96. *Peavler*, 528 N.E.2d at 46.

97. *Merrill*, 332 A.2d at 380 (“That an individual injured by the negligence of the employees of a municipal corporation should bear his loss himself . . . instead of having it borne by the public treasury to which he and all other citizens contribute, offends the basic principles of equality of burdens and of elementary justice.”); *Roman Catholic Diocese of Vt., Inc. v. City of Winooski Hous. Auth.*, 408 A.2d 649, 650 (Vt. 1979) (noting that the effect of government immunity is to “sacrifice the injured citizen to the benefit of the public treasury”); see also *supra* note 51.

98. See discussion *supra* Part IV.B. and note 54.



## VI. GOVERNMENT IMMUNITY IN WISCONSIN

In Wisconsin, government immunity<sup>99</sup> refers to the immunity of the state's political subdivisions for certain acts performed by public officials within the scope of their official duties.<sup>100</sup> Government immunity derives from the common law and is based on public policy considerations.<sup>101</sup>

Prior to the landmark decision in *Holytz v. City of Milwaukee*,<sup>102</sup> a broad-sweeping rule of government immunity existed in Wisconsin.<sup>103</sup> The *Holytz* court, recognizing the injustice of such a broad rule of government immunity, substantially limited the doctrine so that only the exercise of legislative, judicial, quasi-legislative, or quasi-judicial functions<sup>104</sup>—those acts involving judgment in determining policy or the

99. In Wisconsin, the concept of government immunity is sometimes referred to as "governmental immunity" or "municipal immunity" or "public officer immunity" or "discretionary act immunity." *Hoskins v. Dodge County*, 2002 WI App 40, ¶ 13, 251 Wis. 2d 276, 642 N.W.2d 213. Wisconsin's doctrine of government immunity is distinct from the state's sovereign immunity. *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 89–90, n.7, 596 N.W.2d 417, 421–22, n.7 (1999). Wisconsin's sovereign immunity stems from the Wisconsin constitution, which provides that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." WIS. CONST., art. IV, §27. This constitutional provision led to the rule that the state cannot be sued without its consent. *Bicknese v. Sutula*, 2003 WI 31, ¶ 69, 260 Wis. 2d 713, 660 N.W.2d 289 (citing *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 291, 240 N.W.2d 610, 617 (1976)). Wisconsin's doctrine of government immunity derives not from the Wisconsin constitution, but from common law, *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶¶ 22–23, 253 Wis. 2d 323, 646 N.W.2d 314, and is now codified in section 893.80(4) of the Wisconsin statutes, which provides that

[n]o suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

WIS. STAT. § 893.80(4) (2003). Although section 893.80(4) "does not apply to state officers and employees," but rather "only to municipal officers and employees," the "concepts and theories underlying immunity and its exceptions are generally the same for state and municipal officers and employees." *Meyers v. Schultz*, 2004 WI App 234, n.5, 690 N.W.2d 873; see also *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, n.10, 262 Wis. 2d 127, 663 N.W.2d 715.

100. *Scott*, 2003 WI 60, ¶ 14; *Rolland v. County of Milwaukee*, 2001 WI App 53, ¶ 8, 241 Wis. 2d 215, 625 N.W.2d 590.

101. *Lodl*, 2002 WI 71, ¶¶ 22–23; *Kierstyn*, 228 Wis. 2d at 89–90, 596 N.W.2d at 421–22.

102. 17 Wis. 2d 26, 115 N.W.2d 618 (1962), *superseded by statute as stated in Scott*, 2003 WI 60, ¶ 34.

103. *Riley*, *supra* note 33, at 10.

104. *Holytz*, 17 Wis. 2d at 33–35, 39–40, 115 N.W.2d at 621–23, 625; see also *Scott*, 2003 WI 60, ¶¶ 75–77 (Prosser, J., dissenting).

application of a rule to specific facts—would be immune from liability.<sup>105</sup> Essentially, the *Holytz* court made liability the rule and immunity the exception.<sup>106</sup>

Soon after the *Holytz* decision, the Wisconsin legislature adopted *Holytz*'s version of immunity.<sup>107</sup> Today, this version of the doctrine of government immunity is codified in section 893.80(4) of the Wisconsin Statutes.<sup>108</sup> Under the statute,

[n]o suit may be brought against any . . . political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.<sup>109</sup>

Like the *Holytz* court, the Wisconsin legislature intended to make the state's political subdivisions liable for tortious conduct, except for those limited times when the public officials were exercising legislative, judicial, quasi-legislative, or quasi-judicial functions,<sup>110</sup> or in other words, when the public officials were making policy decisions or applying a rule to specific facts.<sup>111</sup>

Unfortunately, the doctrine of government immunity has been extended far beyond protecting just those acts of a policymaking or

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105. *Lifer v. Raymond*, 80 Wis. 2d 503, 511–12, 259 N.W.2d 537, 541–42 (1977) (“A quasi-legislative act involves the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed. A quasi-judicial act involves the exercise of discretion and judgment in the application of a rule to specific facts.”)

106. *Holytz*, 17 Wis. 2d at 39, 115 N.W.2d at 625.

107. See WIS. STAT. § 893.80(4) (2003); see also *Scott*, 2003 WI 60, ¶ 34.

108. See *Scott*, 2003 WI 60, ¶ 34.

109. WIS. STAT. § 893.80(4) (2003). Section 893.80(4) “does not apply to state officers and employees,” but rather “only to municipal officers and employees.” *Meyers v. Schultz*, 2004 WI App 234, n.5, 690 N.W.2d 873. However, in Wisconsin, the “concepts and theories underlying immunity and its exceptions are generally the same for state and municipal officers and employees.” *Id.* at n.5; see also *Scott*, 2003 WI 60, n.10.

110. WIS. STAT. § 893.80(4) (2003); *Scott*, 2003 WI 60, ¶¶ 78–79 (Prosser, J., dissenting) (“[A] government agency seeking to rely on [section 893.80(4)] as a defense against the negligence of its employee should be required to establish that the employee’s negligence occurred in the exercise of some legislative, quasi-legislative, judicial, or quasi-judicial function.”); *Riley*, *supra* note 33, at 10.

111. *Lifer v. Raymond*, 80 Wis. 2d 503, 511–12, 259 N.W.2d 537, 541–42 (1977).

judicial character.<sup>112</sup> This is because in construing the statute, the Wisconsin courts began to interpret the terms “quasi-legislative” and “quasi-judicial” as synonymous with the term “discretionary.”<sup>113</sup> Because almost every government act or decision involves some amount of discretion,<sup>114</sup> government immunity has once again become the rule and liability is now the exception.<sup>115</sup> Such a broad doctrine of immunity is contrary to legislative intent and produces unjust results.<sup>116</sup>

The fact that Wisconsin’s government immunity doctrine is too broad is evidenced by the judicial attempts to limit the application of government immunity by creating exceptions to immunity. These exceptions impose liability “where the activities performed are (1) ministerial duties imposed by law, (2) duties to address a known danger, (3) actions involving professional discretion, and (4) actions that are malicious, willful, and intentional.”<sup>117</sup> While these judicially-created exceptions limit the doctrine of government immunity, they have been interpreted narrowly<sup>118</sup> and have not limited the doctrine enough to ensure that government immunity is only applied when policy warrants its application.

When is the application of government immunity warranted by policy? The Wisconsin courts have set forth the following policy considerations to be considered in determining whether government immunity should apply:

- (1) The danger of influencing public officers in the performance of their functions by the threat of lawsuit;
- (2) The deterrent effect which the threat of personal liability might have on those who are considering entering public service;
- (3) The drain on valuable time caused by such actions;
- (4) The unfairness of subjecting officials to personal liability for the acts of their subordinates; and
- (5) The feeling that the ballot and removal procedures are more appropriate methods of dealing with

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112. See, e.g., *Scott*, 2003 WI 60.

113. *Id.* ¶ 16, 262 Wis. 2d at 139, 663 N.W.2d at 721; see also Riley, *supra* note 33, at 10.

114. *Indus. Risk Insurers v. New Orleans Pub. Service, Inc.*, 735 F.Supp. 200, 203 (E.D. La. 1990); *Ham v. Los Angeles County*, 189 P. 462, 468 (Cal. Dist. Ct. App. 1920); *Peavler v. Bd. of Comm’rs of Monroe County*, 528 N.E.2d 40, 43 (Ind. 1988); *Hacking v. Town of Belmont*, 736 A.2d 1229, 1234 (N.H. 1999); *Trujillo v. Utah Dep’t of Transp.*, 986 P.2d 752, 758 (Utah Ct. App. 1999); *Bagby & Gittings*, *supra* note 38 at 228.

115. *Scott*, 2003 WI 60, ¶ 79 (Prosser, J., dissenting).

116. See *id.* ¶¶ 75–82 (Prosser, J., dissenting).

117. *Id.* ¶ 16.

118. See *id.* ¶ 79 (Prosser, J., dissenting).

misconduct in public office.<sup>119</sup>

The first and fifth policy considerations, the desire to ensure that public officials are able to use free and independent judgment in the performance of their functions and the desire that the misconduct of public officials be dealt with through the political process rather than the court system, are valid reasons for applying government immunity because they involve separation of powers concerns.<sup>120</sup> The threat of liability for policy decisions in a tort suit might indeed interfere with the free and independent judgment of public officials when making policy decisions,<sup>121</sup> and the ability of public officials to use free and independent judgment is necessary to maintain separate and co-equal branches of government.<sup>122</sup> In addition, it is true that the court system may not be the best forum for analyzing policy decisions, which involve social, political, and economic judgments.<sup>123</sup> Such judgments are best made by public officials and should not be second-guessed by courts.<sup>124</sup>

However, the second, third, and fourth policy factors cited by the Wisconsin courts are inadequate to justify applying government immunity. The second policy factor listed, concerning the deterrent effect liability might have on those entering public service, does not justify applying government immunity.<sup>125</sup> Removing government immunity would simply mean that public officials who are not acting in a policymaking capacity would be placed on equal footing with private parties.<sup>126</sup> Therefore, the threat of liability should no more deter individuals from entering public service than the threat of liability would deter individuals from working for a private entity.

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119. *Id.* at n. 26.

120. *See supra* Part IV.

121. *Peavler v. Bd. of Comm'rs of Monroe County*, 528 N.E.2d 40, 44 (Ind. 1988); *Haddock v. City of New York*, 553 N.E.2d 987, 991 (N.Y. 1990); *Hillerby v. Town of Colchester*, 706 A.2d 446, 457 (Vt. 1997) (Johnson, J. dissenting); *Scott*, 2003 WI 60, ¶ 36; *KEETON ET AL.*, *supra* note 15, § 131, at 1033; *Bagby & Gittings*, *supra* note 38, at 247; *Krause*, *supra* note 21, at 502.

122. *See Hillerby*, 706 A.2d at 457.

123. *See Indus. Indem. Co. v. Alaska*, 669 P.2d 561, 563 (Alaska 1983); *Peavler*, 528 N.E.2d at 44–45, 47; *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 431 (Tenn. 1992); *Bagby & Gittings*, *supra* note 38, at 247.

124. *See Peavler*, 528 N.E.2d at 44.

125. *See supra* Part IV.D.

126. *City of Louisville v. Chapman*, 413 S.W.2d 74, 77 (Ky. Ct. App. 1967); *Merrill v. Manchester*, 332 A.2d 378, 383 (N.H. 1974); *Hillerby v. Town of Colchester*, 706 A.2d 446, 458 (Vt. 1997) (Johnson, J., dissenting).

The third policy factor listed, concerning the drain on valuable time, also does not justify the application of government immunity.<sup>127</sup> Although removing government immunity may increase the amount of litigation and the administrative burden, there is no evidence that the orderly administration of government would be disrupted “in any meaningful way.”<sup>128</sup> Moreover, any increased administrative burden must be endured to ensure that those injured by the tortious conduct of public officials are compensated.<sup>129</sup> The government can reduce the amount of time spent on litigation by using due care in the performance of its duties and avoiding the tortious conduct that serves as the basis for such lawsuits.

The fourth policy factor, concerning the “unfairness of subjecting public officials to personal liability for the acts of their subordinates,”<sup>130</sup> is also inadequate to justify government immunity.<sup>131</sup> Again, public officials, when they are not involved in policymaking, should be liable to the same extent private parties would be liable.<sup>132</sup> Because individuals in private corporations are liable for the acts of their subordinates, government should also be liable in this way. Applying government immunity for this reason would only reduce the incentive to create a more accountable government system.<sup>133</sup>

In conclusion, many of the factors the Wisconsin courts currently consider in determining whether to apply government immunity are inadequate to justify the doctrine. Where the policy considerations underlying the doctrine do not adequately justify applying government

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127. See *supra* Part IV.C.

128. See *Riley*, *supra* note 33, at 14; see also *supra* note 58.

129. *Merrill*, 332 A.2d at 380; *Roman Catholic Diocese of Vt., Inc. v. City of Winooski Hous. Auth.*, 408 A.2d 649, 650 (Vt. 1979); see also *supra* note 50.

130. *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, n.26, 262 Wis. 2d 127, 663 N.W.2d 715.

131. See *Riley*, *supra* note 33, at 14 (“Public officials are not generally personally liable for the acts of their subordinates, and insurance and indemnification would shield them from any personal financial impacts.”); see also *supra* Part IV (suggesting that, as a general rule, government should be subject to the same rules as private parties for tortious conduct and that only separation of powers concerns are adequate to justify government immunity).

132. *Merrill*, 332 A.2d at 380 (stating that “removal of immunity does not impose absolute or strict liability on cities and towns but merely places them subject to the same rules as private corporations if a duty has been violated and a tort committed”); *Hillerby v. Town of Colchester*, 706 A.2d 446, 458 (Vt. 1997) (Johnson, J., dissenting) (noting that government should be placed “on an equal footing with private corporate entities” for tortious conduct unless the government action is “policy-based or . . . adjudicative, legislative, or regulatory in nature”).

133. See discussion *supra* Part IV & note 54.

immunity, the doctrine has the potential to be applied in situations where it is unnecessary, and a broad application of government immunity can lead to unjust results.<sup>134</sup> To ensure that government immunity is applied only in those limited circumstances where policy justifies it, courts need to focus on the particular act at issue and consider the following three factors: (1) whether the nature of the act is discretionary, (2) whether the act involves policy decisions, and (3) whether the court system is an appropriate place for monitoring or disciplining the act. Determining the applicability of government immunity on a case-by-case basis using these factors will ensure that government immunity is applied only in situations where it is justified.<sup>135</sup>

#### VII. *SCOTT V. SAVERS PROPERTY & CASUALTY INSURANCE COMPANY*

In *Scott v. Savers Property & Casualty Insurance Co.*, a student named Ryan Scott, along with his parents, met with Dave Johnson, the guidance counselor at Ryan's school, to determine which courses Ryan needed to take to be eligible for a hockey scholarship to the University of Alaska, a National Collegiate Athletic Association ("NCAA") Division I school.<sup>136</sup> The Scotts specifically asked Johnson whether "Broadcast Communication" was approved by the NCAA as fulfilling a core English requirement.<sup>137</sup> Johnson misinformed the Scotts that "Broadcast Communication" was approved by the NCAA even though information that the course was not approved was available to Johnson.<sup>138</sup> Ryan relied on the information Johnson provided and enrolled in the "Broadcast Communication" course.<sup>139</sup>

After graduation, Ryan accepted a full four-year scholarship to the University of Alaska.<sup>140</sup> However, the scholarship offer was contingent upon an eligibility certification from the NCAA,<sup>141</sup> and, because "Broadcast Communication" was not approved as fulfilling a core

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134. See, e.g., *Scott*, 2003 WI 60, ¶¶ 75–82 (Prosser, J., dissenting). Government immunity should be narrowly construed. *Peavler v. Bd. of Comm'rs of Monroe County*, 528 N.E.2d 40, 46 (Ind. 1988).

135. See *Hillerby*, 706 A.2d at 459 (Johnson, J., dissenting) ("Although it will not be easy to set forth on a case-by-case basis a principled and cohesive doctrine that is both fair and consistent, it will be far better than allowing to stand a doctrine acknowledged to be inequitable and inconsistent.")

136. *Scott*, 2003 WI 60, ¶ 8.

137. *Id.* ¶ 9.

138. *Id.*

139. *Id.*

140. *Id.* ¶ 10.

141. *Id.*

English requirement, the NCAA determined that Ryan was ineligible for the scholarship.<sup>142</sup> The University of Alaska subsequently rescinded the scholarship.<sup>143</sup>

The guidance counselor's negligence was clear.<sup>144</sup> The real issue in the case was whether the school district was immune from liability under Wisconsin's government immunity statute.<sup>145</sup> The court began its analysis by asking whether the guidance counselor's act could be considered legislative, quasi-legislative, judicial, or quasi-judicial.<sup>146</sup> This inquiry was essentially a determination as to whether the act was discretionary.<sup>147</sup> Although the counselor was required by law to provide guidance and counseling services to students,<sup>148</sup> the court concluded that the counselor's act was discretionary.<sup>149</sup> According to the court, a counselor's general duty to provide counseling does not mandate exactly what advice or information a counselor should give to students.<sup>150</sup> Thus, the court determined that the school was immune and that Ryan would be left without a remedy unless one of the judicially-created exceptions to immunity applied.<sup>151</sup> The judicially-created exceptions imposing liability occur "where the activities performed are (1) duties imposed by law, (2) duties to address a known danger, (3) actions involving professional discretion, and (4) actions that are malicious, willful, and intentional."<sup>152</sup> In the *Scott* case, the court determined that the duties were discretionary and not imposed by law<sup>153</sup> and that the professional discretion exception to governmental immunity did not apply.<sup>154</sup> The parties did not claim that a known danger was present or that the actions of the counselor were malicious, willful, or intentional. Because the court found that none of the exceptions to immunity applied, the court held that the school district was immune from liability and that

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142. *Id.*

143. *Id.*

144. *Id.* ¶ 37.

145. *Id.* ¶ 14.

146. *See id.* ¶¶ 15–16.

147. *See id.*

148. The District was obligated to provide guidance and counseling services. WIS. STAT. § 121.02(1)(e) (2003); WIS. ADMIN. CODE P.I. § 8.01(2)(e) (2003).

149. *Scott*, 2003 WI 60, ¶ 28.

150. *Id.*

151. *Id.* ¶ 16.

152. *Id.*

153. *Id.* ¶ 18.

154. *Id.*

Ryan had “no avenue for redress.”<sup>155</sup>

The justices recognized that the outcome of the *Scott* case was “harsh,” especially because the negligence was so clear.<sup>156</sup> However, the majority was concerned that removing the protection of immunity would adversely impact Wisconsin students. As the court noted,

[g]uidance counselors are important figures in our educational system. They are regularly required to make discretionary decisions and judgment calls in performing their functions, and the future progress and success of students rests on the ability of the guidance counselors to make those decisions. Immunity allows guidance counselors to perform their duties free from the hindrance of threats of litigation or liability.<sup>157</sup>

Although the desire to protect the discretionary decisions of guidance counselors may have been well-intentioned, government immunity simply should not be used to protect all decisions made by guidance counselors or any other public officials.<sup>158</sup> Rather, government immunity should only be used to protect against liability when government action involves decisions of a policymaking character<sup>159</sup> or decisions that should not be assessed in the courts.<sup>160</sup>

To determine whether government immunity should apply, Wisconsin courts should consider (1) the discretionary nature of the particular act at issue, (2) whether the act involves policy decisions, and (3) whether the political process or the court system is the appropriate place for monitoring or disciplining such an act. Applying these three factors to the *Scott* case illustrates why the result of the case was unjust and why government immunity should not have been applied.

In *Scott*, the court applied government immunity because guidance

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155. *Id.* ¶¶ 37–38.

156. *Id.* ¶ 37.

157. *Id.* ¶ 36.

158. See *Peavler v. Bd. of Comm’rs of Monroe County*, 528 N.E.2d 40, 44–47 (Ind. 1988); *Hacking v. Town of Belmont*, 736 A.2d 1229, 1232–34 (N.H. 1999); *Kautzman v. McDonald*, 621 N.W.2d 871, 879–80 (N.D. 2001); *Trujillo v. Utah Dep’t of Transp.*, 986 P.2d 752, 757–61 (Utah Ct. App. 1999); *Bagby & Gittings*, *supra* note 38, at 228.

159. *Indus. Risk Insurers v. New Orleans Pub. Service, Inc.*, 735 F. Supp. at 202–03; *Peavler*, 528 N.E.2d at 46; *Hacking*, 736 A.2d at 1234; *Haddock v. City of New York*, 553 N.E.2d 987, 991 (N.Y. 1990); *Trujillo*, 986 P.2d at 758–59.

160. *Indus. Indem. Co. v. Alaska*, 669 P.2d 561, 563 (Alaska 1983); *Peavler*, 528 N.E.2d at 44–45, 47; *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 431 (Tenn. 1992); *Bagby & Gittings*, *supra* note 38, at 247.



counselors generally perform discretionary functions.<sup>161</sup> However, the court should not have focused on the general duties of the guidance counselor or his status as a guidance counselor; rather, the court should have focused on the particular act at issue and whether that act was discretionary in nature.<sup>162</sup> By focusing on the particular act at issue, the court would have realized that the guidance counselor's action in misinforming Ryan about the NCAA student-athlete scholarship eligibility requirements was not discretionary in nature. The guidance counselor had the necessary information available to him and needed only to correctly relay that information to Ryan. His act did not involve making a choice or a judgment; there were not two or more acceptable results.<sup>163</sup> Rather, he was to act in a way that was specifically directed by the information he had available to him: he was to inform Ryan that "Broadcast Communication" was not approved by the NCAA as fulfilling a core English requirement. Thus, the nondiscretionary nature of the act would have weighed against applying government immunity.<sup>164</sup>

Additionally, in determining whether the particular act at issue deserves to be protected by government immunity, the court should have looked beyond the discretionary nature of the act to ensure that a social policy "of great importance,"<sup>165</sup> such as the separation of powers, justified shielding the act from liability and leaving the victim of the tortious conduct without a remedy.<sup>166</sup> Here, the guidance counselor's actions did not implicate the separation of powers. The guidance counselor did not make a policy decision or a judgment call that involved weighing competing social, economic, or political factors, and judicial review of the guidance counselor's action in this case would not hamper the independent judgment of guidance counselors in factually similar situations because no independent judgment is required in such circumstances.

Finally, the court should have considered whether a tort suit would have been an appropriate way to monitor the government action.<sup>167</sup>

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161. *Scott*, 2003 WI 60, ¶ 36.

162. *Rolland v. County of Milwaukee*, 2001 WI App 53, ¶ 8, 241 Wis. 2d 215, 625 N.W.2d 590 ("[I]t is the nature of the specific act upon which liability is based, as opposed to the categorization of the general duties of a public officer, which is determinative of whether an officer is immune from liability." (internal citation omitted)).

163. *See supra* Part V.

164. *See supra* Part V.

165. *KEETON ET AL.*, *supra* note 15, § 131, at 1032.

166. *See supra* Part V.

167. *See supra* Part V.

Here, a tort suit would have been appropriate because there are recognized, objective, professional standards that can be applied to the challenged act to make tort liability a reliable assessment.<sup>168</sup> The guidance counselor had the information and only needed to correctly relay it.<sup>169</sup> Professional standards of due care and diligence would have provided reliable standards for assessing the conduct.

Government immunity should not have shielded the guidance counselor's negligent misrepresentation of information. Although the court was trying to protect students, the result was likely detrimental to students. By protecting the misrepresentations of the guidance counselor, students will likely be less confident that guidance counselors will be providing accurate information and may not be able to rely on the information provided.

Wisconsin's government immunity doctrine has strayed so far off course that public officials are not being held accountable for using care in the performance of their duties. Allowing the guidance counselor's lack of care to go unchecked was the real flaw of the *Scott* case.

#### VIII. CONCLUSION

Wisconsin's doctrine of government immunity can serve important public policies. However, Wisconsin's government immunity doctrine is in need of revision. Some of the current policy considerations cited as underlying the doctrine are inadequate to support the application of government immunity. In addition, the analysis used in determining whether government immunity should apply needs to be reexamined. Wisconsin courts need to focus on the particular act at issue and not on the status or general duties of the government official. Courts also need to ensure that government immunity protects conduct only when policy warrants it by considering (1) the discretionary nature of the government action, (2) whether the act involves policy decisions, and (3) whether the court system is an appropriate place for monitoring or disciplining the government action. Such an analysis will ensure that government is only exempted from liability when it is justified and that victims like Ryan Scott are fairly compensated for the negligence of public officials.

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168. See *supra* Part V; see also *supra* note 93.

169. See *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 9, 262 Wis. 2d 127, 663 N.W.2d 715.

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